

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

CRAIG ROCHA

Claimant

VS.

WESTOFF SAND COMPANY

Respondent

AND

INSURANCE UNKNOWN

Insurance Carrier

AND

KANSAS WORKERS COMPENSATION FUND

[illegible]

Docket No. 180,180

ORDER

ON the 4th day of January, 1994, the application of the claimant for review by the Workers Compensation Appeals Board of an Order entered by Administrative Law Judge George R. Robertson on December 6, 1993, modified by a Nunc Pro Tunc Order entered by Administrative Law Judge George R. Robertson on December 7, 1993, came regularly on for oral argument by telephone conference.

APPEARANCES

The claimant appeared by and through his attorney, Russell B. Cranmer, of Wichita, Kansas. The respondent appeared. The respondent employer, Westoff Sand Company, on the date of the alleged injury, was uninsured. The Kansas Workers Compensation Fund appeared by and through its attorney, Jerry Moran, of Hays, Kansas. There no other appearances.

This is an appeal by the claimant from a preliminary order finding that claimant had failed to prove by a preponderance of the credible evidence that his allegations of an injury on or about May 26, 1993, are more probably true than not true, and as a result of this finding temporary total and medical benefits to the claimant were denied.

The Kansas Workers Compensation Fund denies claimant met with personal injury by accident on May 26, 1993, arising out of and in the course of his employment.

ISSUES

(1) Did claimant meet with personal injury by accident arising out of and in the course of his employment on the date alleged?

RECORD

The record in this case consists of the documents on file with the Division of Workers Compensation, including the transcript of preliminary hearing proceedings dated November 4, 1993, and exhibits attached thereto, the December 2, 1993 transcript of preliminary hearing including the depositions of Eric Corbett, Eva McGinty, and Todd Lintel, and exhibits attached thereto, and the transcript of deposition testimony of Earl Westoff dated November 29, 1993.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the evidence presented and for the purpose of preliminary hearing, the Workers Compensation Appeals Board finds as follows:

(1) Claimant has failed to meet his burden that he suffered personal injury by accident arising out of and in the course of his employment on May 26, 1993.

Claimant alleged an injury to his low back on May 26, 1993, while lifting pipe for Westoff Sand Company. Notice was not provided to Westoff Sand Company or any of its employees regarding this alleged injury until June 8, 1993, subsequent to claimant's termination of employment. Evidence was provided to show that on the alleged date of injury claimant worked 13.5 hours with no complaints. On the day after the alleged injury, May 27, 1993, the claimant worked 7.5 hours until he was terminated as a result of a dispute with his supervisor, Todd Lintel. Additional evidence was provided to show that, subsequent to the termination, but prior to the claimant seeking medical care on June 8, 1993, claimant was observed on two occasions jet-skiing, with no indication of any physical problems being noted.

On May 27, 1993, claimant had a discussion with Eva McGinty, the secretary of Westoff Sand Company, and no mention was made to Ms. McGinty by the claimant regarding any injury or accident suffered while in the employ of Westoff Sand Company.

Eric Corbett, Eva McGinty and Todd Lintel testified that the claimant, at no time prior to June 8, 1993, reported an injury arising out of and in the course of his employment with Westoff Sand Company.

K.S.A. 1992 Supp. 44-501(a) states in part:

"In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation by proving the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record."

K.S.A. 1992 Supp. 44-508(g) states:

"'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

The burden of proof is upon the claimant to establish his right to an award for compensation by proving all the various conditions on which his right to a recovery depends. Box v. Cessna Aircraft Co., 236 Kan. 237, 689 P.2d 871 (1984).

The Appeals Board, after considering the whole record, finds that the claimant has failed in his burden of proving an injury arising out of and in the course of his employment on May 26, 1993.

WHEREFORE, it is the finding, decision and order of the Appeals Board that the Order of Administrative Law Judge George R. Robertson, dated December 6, 1993, is affirmed in all respects.

Fees necessary to defray the expenses of administration of the Workers Compensation Act are assessed against the Kansas Workers Compensation Fund pursuant to K.S.A. 44-532a.

IT IS SO ORDERED.

Dated this _____ day of January, 1994.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

cc: Russell B. Cranmer, 2831 East Central, Wichita, Kansas 67214
Jerry Moran, P.O. Box 128, Hays, Kansas 67601
George R. Robertson, Administrative Law Judge
George Gomez, Director